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No.

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In the

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH PANTOJA, JERRY MEYER, CHRIS PEDERSEN,

Petitioners,

vs.

ALL-AMERICAN TRANSPORT, INC., AMERICAN FREIGHT SYSTEM, INC., TERMINAL TRANSPORT COMPANY, INC., MID-CONTINENT FREIGHT LINES, INC.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 705,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a union member must exhaust internal union remedies as a precondition to filing an action under § 301 of the Labor-Management Relations Act where, although the collective bargaining agreement includes no deadline for the filing of grievances, the permanent joint arbitration committee created by that agreement asserts the power to dismiss a grievance on the extra-contractual grounds of laches.

2. Whether, in determining whether a transfer of corporate ownership takes place between independent or related companies for purposes of selecting the appropriate seniority provisions of a collective bargaining agreement, the ultimate purpose of nominally independent corporations to join under a common roof can be considered.

PARTIES

The parties to this action are all named in the caption.

TABLE OF CONTENTS

	PAGE
Questions Presented For Review	i
Parties	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction of the Supreme Court	2
Statutes Involved	2
Statement of the Case	2
(a) Procedural History	2
(b) Petitioners v. The Union	3
(c) Petitioners v. The Employers	5
Basis of Federal Jurisdiction Below	10
Reasons for Allowing the Writ	11
I. THE COURT OF APPEALS MISAPPLIED THIS COURT'S RECENT DECISION IN *CLAYTON v. UAW* IN REQUIRING PETITIONERS TO EXHAUST INTERNAL UNION REMEDIES AS A CONDITION PRECEDENT TO FILING AN ACTION UNDER § 301 OF THE LABOR-MANAGEMENT RELATIONS ACT WHERE, IN LIGHT OF THE NON-CONTRACTUAL PRACTICE OF THE JOINT ARBITRATION COMMITTEE OF APPLYING THE DOCTRINE OF *LACHES* TO GRIEVANCES WHICH IT CONSIDERS STALE, THE ABSENCE OF A CONTRACTUAL GRIEVANCE DEADLINE CANNOT GUARANTEE THAT INTERNAL UNION REMEDIES CAN REINSTATE PETITIONERS' GRIEVANCE	11

PAGE

II. THE ULTIMATE INTENTION OF A GROUP OF NOMINALLY INDEPENDENT COMPANIES TO MERGE UNDER A SINGLE ROOF IS MATERIAL IN DETERMINING WHETHER THOSE SENIORITY PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT GOVERNING INDEPENDENT OR THOSE GOVERNING INTER-RELATED EMPLOYERS SHOULD APPLY. 15

Conclusion 18

Appendix 1a

A. Excerpts from the Collective Bargaining Agreement and Union Constitution 1a

i) Seniority Provisions 1a

ii) Internal Union Remedies 7a

iii) Grievance Provisions 2a

B. Decisions and Orders of the District Court 9a

C. Order of the Court of Appeals 17a

TABLE OF AUTHORITIES

Clayton v. *U.A.W.*, 451 U.S. 679, 68 L. Ed.2d 538, 101 S. Ct. 2088 (1981) 11

Hines v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 47 L. Ed.2d 231, 96 S. Ct. 1048 (1976) 11

A. Kesner, 209 N.L.R.B. 294 (1974) 13

Republic Steel Corp. v. *Maddox*, 379 U.S. 650, 13 L. Ed.2d 580, 85 S. Ct. 614 (1965) 11

Vaca v. *Sypes*, 386 U.S. 171, 17 L. Ed.2d 842, 87 S. Ct. 903 (1967) 11

§ 301, Labor-Management Relations Act. 29 U.S.C., § 185(a) 11

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OPINIONS BELOW

There are no official or unofficial reports of any orders or opinions below. The unpublished orders of the Court of Appeals (*Joseph Pantoja et al.* v. *All-American Transport System, et al.*, Nos. 81-1206, 81-1238, consolidated) and of the District Court (*Joseph Pantoja, et al.* v. *All-American Transport System, et al.*, No. 77 C 3859, D.C. N.D.Ill.) are attached as appendices to this petition.

JURISDICTION OF THE SUPREME COURT

The decision of the Court of Appeals was rendered on September 1, 1982 by unpublished order pursuant to Seventh Circuit Rule 35, and appears as an appendix to this petition. No rehearing or extension of time in which to file this petition for certiorari has been sought.

Jurisdiction lies to the Supreme Court pursuant to 28 U.S.C. 1254(1)

STATUTES INVOLVED

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy, or without regard to the citizenship of the parties.
>
> Labor-Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185(a)

STATEMENT OF THE CASE

(a) Procedural History

Petitioners, members of defendant Local 705, International Brotherhood of Teamsters (Union) filed suit in October, 1977 in the District Court for the Northern District of Illinois seeking relief under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, against the four corporate respondents (Employers) for violation of the seniority provisions of a collective bargaining agreement, and against the Union for violation of its duty of fair representation. (A. 1)* Motions of

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* Citations "A" are to the appendix filed in the Court of Appeals. Citations "R" are to the record on appeal. Citations "App." are to the appendix of this petition.

all respondents for summary judgment were initially denied (A. 88, 129), but shortly before trial the District Court considered and allowed the Union's renewed and revised motion for summary judgment based upon Petitioner's alleged failure to exhaust available internal union remedies. The case proceeded to bench trial against the Employers only, and on January 19, 1981, the Court found in favor of the Employers. (A. 226, 237) The oral findings and conclusions of the District Court (A. 227 et seq.) appear in the appendix to this petition. (App. 9a)

Petitioners brought a timely appeal before the Court of Appeals for the Seventh Circuit challenging both the summary judgment in favor of the Union and the judgment after trial in favor of the Employers. On September 1, 1982, the Court of Appeals, by unpublished order, affirmed the entire judgment of the District Court. The order of the Court of Appeals is likewise appended to this petition. (App. 17a)

(b) Petitioners v. The Union

The Petitioners were all truck drivers employed by Respondent Mid-Continent Freight Lines, Inc. The most senior Petitioner (Pantoja) was hired by Mid-Continent in 1955, the most junior (Pedersen) in 1975. (A. 5) Petitioners were also all members of the Union, Local 705 of the International Brotherhood of Teamsters, which acted as their collective bargaining representative. (A. 2)

During the entire period material to this case, there was in effect between the Union and Chicago-area trucking operators (including the local Employers in this case) an area-wide collective bargaining agreement, the Joint Area Cartage Agreement, generally referred to as JACA. Mid-Continent and All-American were signatories to this

agreement. (A. 2) One section of the JACA was devoted to the seniority consequences of transfers of employer ownership, through what the JACA categorized as "buy-out," "merger with wholly-owned subsidiary," and "consolidation."* Briefly summarized, in the event of a "buy-out" the drivers of the acquired employer were end-tailed, or placed at the bottom of the seniority list of the acquiring employer. In the event of a "consolidation" or "merger with wholly owned subsidiary," however, the seniority lists were sandwiched one-for-one, beginning with the most senior driver. Other sections of the JACA set forth grievance procedures.**

Members of the Union were also subject to provisions of the International Constitution of the International Brotherhood of Teamsters, etc. Portions of that Constitution addressed internal remedies which were, the District Court found, available to and mandatory upon aggrieved members of the IBT as a precondition for filing any legal actions against the Union.***

In June of 1977, Petitioner's employer, Respondent Mid-Continent, came under the control of Respondent All-American, itself a newly acquired subsidiary of Texas Gas Transmission Corporation (A. 60 et seq.) Mid-Continent ceased to exist as a corporate entity.+

The Union determined that the change in ownership at Mid-Continent should be treated for seniority purposes as a "buy-out," rather than as a "consolidation" or

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* Set forth in full in the appendix to this petition.

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+ See "Petitioners v. The Employers," *infra.*, p. 5 et. seq. of this petition.

"merger with wholly-owned subsidiary." All-American followed the decision of the Union. As a result, Petitioners were rendered the most junior drivers at All-American.

Petitioners filed a written grievance with the Union, urging that the determination of their seniority under the "buy-out" provision was erroneous and that in fact a consolidation or merger of employers had taken place. The Union refused to process the grievance, finding it to be without merit.

Petitioners then filed their § 301 action in the District Court without any further endeavour to act through the Union or to employ any internal union remedies to review the initial adverse decision on their grievance. Although no issue was raised on this point during the early stages of the case, the Union's second motion for summary judgment (A. 148) was based upon Petitioners' failure to exhaust these remedies, and the District Court awarded summary judgment in favor of the Union on that basis. (A. 216, 218)

The District Court entered its ruling prior to this Court's decision in *Clayton* v. *U.A.W.*, 451 U.S. 679, which was decided while Petitioners' appeal was pending. The Court of Appeals determined that under the *Clayton* standard the ruling of the District Court was correct, and it affirmed the order of summary judgment in favor of the Union.

(c) Petitioners v. the Employers

The District Court denied summary judgment to the Employers, (A. 88, 89, 104) and the case went to bench trial against them. After trial, the District Court found

in favor of all Employers, and made oral findings and conclusions which are set out in the appendix to this petition. (App. 9a)

The transfer of ownership which cost Petitioners their seniority was one of a number of corporate transactions which occurred between June of 1976 and June of 1977. Evidence regarding these transactions was introduced before the District Court and will be briefly summarized here.

In June of 1976, All-American, Inc., a trucking subsidiary of Respondent All-American Transport, applied to the Interstate Commerce Commission for authority to acquire Respondent Mid-Continent. Permission was denied that October. (R. 19, 298) All-American, Inc. was then purchased by Texas Gas Transmission Corporation through its holding company, Respondent American Freight System, Inc. (R. 111, 301) At the same time, All-American, Inc., now a Texas Gas-American Freight System subsidiary, purchased Mid-Continent. (App. 3, R. 111) All-American survived the transaction as a corporate entity and Mid-Continent did not. On reapplication to the Interstate Commerce Commission, All-American received temporary authority for the transaction, and in November of 1976 Mid-Continent employees were placed on a separate seniority list pursuant to the JACA provisions for acquisitions upon I.C.C. temporary permits. (R. 270, 271, 300)

American Freight System was organized before the temporary permit for acquisition of Mid-Continent was sought. (R. 231-216, 309). After American Freight Sys-

tem was organized, the following arrangements and transactions took place:

6/76 Texas Gas made plans for American Freight System to manage All-American and another subsidiary, Terminal Transport, to become effective 4/78. (R. 117-119, 313-316, 323-326);

9/8/76 American Freight System authorized and approved the acquisition of Mid-Continent by All-American. (R. 311-312);

9/8/76 Texas Gas consented to a preliminary agreement for the merger of All-American, Inc. and All-American Transport. (R. 325);

9/8/76 All-American, Inc. agreed to acquire control of Mid-Continent. (R. 313-315, 318, 323);

9/20/76 All-American, Inc. applied to the I.C.C. for permission to acquire Mid-Continent. (R. 19, 129, 298-299);

10/10/76 Texas Gas and American Commercial Lines assumed control of All-American Transport and All-American, Inc. with operations in other cities to be integrated during 12/76. (R. 212-223, 278-279);

11/76 Mid-Continent and Terminal Transport dovetailed their seniority lists in Milwaukee. (R. 46-47, 213-216, 278-279);

11/19/76 The I.C.C. authorized All-American, Inc.'s temporary control of Mid-Continent. (R. 76, 299-300);

11/22/76 Texas Gas and American Commercial Lines obtained temporary authority for control of All-American Transport. (R. 110-111, 149);

12/1/76 All-American, Inc., assumed control over the operations of Mid-Continent pursuant to I.C.C. temporary authority. (R. 15, 22, 24);

2/10/77 All-American, Inc. submitted a second application to the I.C.C. for acquisition of Mid-Continent. American Commercial Lines and Texas Gas replaced All-American Transport in control of All-American, Inc. (R. 145, 315, 316, 321);

2/10/77 American Commercial Lines and Texas Gas assumed control of All-American, Inc.;

3/29/77 I.C.C. hearing was held on the applications for acquisition of Mid-Continent filed by 9/20/76. (A. 60-66);

3/29/77 American Commercial Lines now controlled All-American, Inc. and All-American Transport.;

4/21/77 The I.C.C. granted approval to the acquisition of Mid-Continent by All-American, Inc. (A. 60-66);

6/77 All-American's acquisition of Mid-Continent was consummated with final closing held in 8/77. (R. 302-303).

While All-American operated Mid-Continent under I.C.C. temporary authority, Petitioners were maintained on a separate seniority list from All-American's drivers. (R. 15, 24, 77, 145-146, 267) In June of 1977, however, with the consummation of All-American's acquisition of Mid-Continent, Petitioners were "end-tailed," i.e., added to All-American's seniority list and placed at the very bottom behind every All-American driver of whatever length of service. (R. 38) It is this "end-tail" which was the subject of Petitioners' unsuccessful grievance to the Union.

At trial, Petitioners urged that the series of interlocking corporate transactions among trucking firms and

holding companies had as their purpose the elimination of employees' seniority rights, with consequent economic benefits to the employers. The District Court found that no such intention or plan had been established. (A. 227-236)

In its findings of fact and conclusions of law (set forth in full as part of the appendix to this petition) the District Court made the following observations:

> "It is my conclusion, from the evidence, that when All-American acquired Mid-Continent it was an independent, unique corporate transaction, which constituted a buy-out; and that, under the terms of the contract, under which the plaintiffs had worked, the consequence of that buy-out was that the Mid-Continent employees . . . found themselves at the bottom of the seniority list of All-American Transport drivers. . . .
>
> The plaintiff has a theory that the All-American buy-out of Mid-Continent was not a simple, discreet, unique transaction, but rather the first step in a complex series of corporate maneuvers, orchestrated by Texas Gas, and that part of the scheme was to get Mid-Continent routes and effectuate savings by eliminating Mid-Continent drivers. . . .
>
> [P]laintiffs' contention that this reveals that, at the time of the original All-American buy-out of Mid-Continent, we were really kicking off a long-range conspiracy to deprive the plaintiffs of their rights is not supported by . . . any . . . evidence in the case. Whether or not this was a long-range play may or may not be true; but it isn't relevant. Whatever the subsequent steps were, the first step was a separate, unique, discreet transaction — the buy-out of Mid-Continent by All-American." (A. 230-234)

The District Court accordingly found in favor of the Employers on the merits and denied Petitioners relief. (App. 237)

On timely appeal, the Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court.

BASIS OF FEDERAL JURISDICTION BELOW

Jurisdiction to the federal courts lies under 29 U.S.C. § 185(a).

REASONS FOR ALLOWING THE WRIT

I.

THE COURT OF APPEALS MISAPPLIED THIS COURT'S RECENT DECISION IN CLAYTON v. U.A.W. IN REQUIRING PETITIONERS TO EXHAUST INTERNAL UNION REMEDIES AS A CONDITION PRECEDENT TO FILING AN ACTION UNDER § 301 OF THE LABOR-MANAGEMENT RELATIONS ACT WHERE, IN LIGHT OF THE NON-CONTRACTUAL PRACTICE OF THE JOINT GRIEVANCE ARBITRATION COMMITTEE OF APPLYING THE DOCTRINE OF LACHES TO GRIEVANCES WHICH IT CONSIDERS STALE, THE ABSENCE OF A CONTRACTUAL GRIEVANCE DEADLINE CANNOT GUARANTEE THAT INTERNAL UNION REMEDIES CAN REINSTATE PETITIONERS' GRIEVANCE.

It is by now well established that an employee who hopes to maintain a suit against his employer or his union under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) for violation of a collective bargaining agreement bears an obligation to first exhaust any exclusive grievance and arbitration procedures available to him under that collective bargaining agreement, *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 13 L. Ed.2d 580, 85 S. Ct. 614 (1965), *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 47 L. Ed.2d 231, 96 S. Ct. 1048 (1976), *Vaca* v. *Sipes,* 386 U.S. 171, 17 L. Ed.2d 842, 87 S. Ct. 903 (1967). More recently, this Court has turned its attention to the related question of whether such an employee is also obligated to exhaust internal union procedures before bringing an action under § 301, *Clayton* v. *United Auto Workers,* 451 U.S. 679, 68 L. Ed.2d 538, 101 S. Ct. 2088 (1981).

Clayton established a test of at least three factors to be applied in determining whether, in a given case, exhaustion of internal union remedies is a condition precedent to a suit under § 301. The Court there held:

> As we stated in NLRB v. Marine Workers, supra, 391 U.S. at 426 . . . , courts have discretion to decide whether to require exhaustion of internal union procedures. In exercising this discretion, at least three factors should be relevant: first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedure would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.
>
> *Clayton* v. *United Auto Workers*, 451 U.S. at ....., 68 L. Ed. 2d at 548-49, 101 S. Ct. at 2095.

No claim has been raised that either the first or the third *Clayton* factor is applicable in this case. Attention has been concentrated instead on the second factor, which is itself bifurcated. Under this factor the employee must exhaust the remedies available within the union if these remedies can either:

> 1) afford him whatever relief he is actually seeking through the courts in his § 301 suit;
>
> or
>
> 2) reactivate his grievance.

Again, attention in this case is devoted to only one aspect of this test. It has not been asserted by anyone that the internal remedies available to Petitioners were adequate to afford them the same relief they sought under § 301. Instead, Respondents argued, and the courts below held, that the absence a deadline for the filing of grievances distinguished this case from *Clayton* and assured that internal union remedies would be sufficient to reactivate Petitioners' grievance. As a result, the Court of Appeals affirmed the District Court's award of summary judgment in favor of Respondent Union.

The Court of Appeals was wrong in distinguishing *Clayton* on this basis, and in ruling that the mere absence of a strict contractual grievance deadline in the collective bargaining agreement is sufficient to support a determination that an internal appeal through the union is adequate to reinstate the grievance. On the contrary, it is the established practice under the Joint Area Collective Bargaining Agreement, as established by at least one reported decision of the National Labor Relations Board, *Kesner,* 209 N.L.R.B. 294 (1974), that the Joint Grievance Committee established by the JACA asserts and may exercise the non-contractual power to dismiss a grievance for laches. Thus, in *Kesner,* the N.L.R.B. noted that:

> "One of the several bases for dismissal of the A. Kesner grievance . . . was that it was not timely filed. The joint cartage agreement does not impose a flat contract deadline on the filing of grievances. The joint grievance committee here interposed a limitation analogous to laches. . . . On this basis alone, and quite apart from the merits, the 12-man board acted well within the limits of ordinary fairness in disposing of the A. Kesner matter."
> *A. Kesner,* 209 N.L.R.B. 294 at 306, n. 23.

This case is, therefore, unlike *Clayton* in that the limitation on the power of the union to reinstate the grievance is to be found outside the face of the collective bargaining agreement. Yet the Court of Appeals, in a conclusion inconsistent with the purpose of *Clayton*, has implied that a restriction on the right of reinstatement which is not to be found within the bargaining agreement may be disregarded in applying the *Clayton* factors.*

It is, of course, by no means clear whether the Joint Grievance Committee would apply a non-contractual deadline and dismiss a grievance which had been delayed while making its way through union appeals. A sense of fairness would lead one to hope not. On the other hand, a sense of fairness would also lead one to expect that where the collective bargaining agreement does not provide a deadline for the filing of grievances, then the joint arbitration committee would not create one *ex post facto*. *Kesner*, however, makes it clear that the JACA is subject to an unwritten gloss, part of which is an unknown deadline for the filing of grievences.

This Court should grant certiorari in order to make it clear that where, by reason of such a non-contractual practice, the union cannot guarantee that the exhaustion of internal union remedies will not run a grievant afoul of an unknown, unwritten, deadline, then the grievant cannot be compelled to pursue those internal remedies as a precondition to seeking judicial relief under § 301.

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* The *laches* rule applied in *A. Kesner* was not addressed in the opinion of the Court of Appeals, and it is not clear from the briefs whether that Court was aware of *Kesner*.

II.

THE ULTIMATE INTENTION OF A GROUP OF NOMINALLY INDEPENDENT CORPORATIONS TO MERGE UNDER A SINGLE ROOF IS MATERIAL IN DETERMINING WHETHER THOSE SENIORITY PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT GOVERNING INDEPENDENT OR THOSE GOVERNING INTER-RELATED TRANSFERS SHOULD APPLY.

Petitioners' case against the Employers depends upon a question of law: namely, which of several seniority provisions was to govern their seniority status as drivers for Respondent All-American after All-American acquired their former employer, Mid-Continent. Under the "buy-out" clause of the JACA, petitioners are essentially treated as new employees of the purchasing employer, and drop to the bottom of the new seniority list. For example, Petitioner Pantoja, with over twenty years of seniority at Mid-Continent, lost his entire seniority accumulation because All-American elected to treat the acquisition as a "buy-out." Under "consolidation" or "merger with wholly owned subsidiary" seniority provisions of the JACA, Petitioners would have received much more favorable treatment, their "names being sandwiched in, one-for-one, starting with the most senior Employee in each company," JACA, Art. 8, sec. 7(c) (See Appendix to this petition; App. 1a - 2a).

The District Court and the Court of Appeals rejected Petitioners' arguments that the wrong seniority clause had been applied. In so deciding, both courts made the erroneous determination that if Petitioners failed to establish a deliberate intention on the part of the Employers to cheat them out of their seniority rights, then

the background of multiple corporate transactions against which the All-American/Mid-Continent transfer occurred was immaterial in deciding the appropriate seniority provision.

Petitioners had urged, in essence, that the acquisition of Mid-Continent by All-American was only one of a large number of transactions whereby Texas Gas Transport Corporation expanded its holdings into midwestern trucking operations by gaining control of various subsidiary corporations which, in turn, acquired still further subsidiaries of their own, creating a multi-strand corporate chain. It was part of this overall plan for All-American, a new Texas Gas subsidiary, to acquire Mid-Continent. Thus, Petitioners argue, in light of the grand Texas Gas net already cast over the nominally independent Mid-Continent, Mid-Continent's acquisition by All-American was not truly the buy-out of one independent company by another but was rather a merger or consolidation of two companies which were, in fact if not yet in form, both Texas Gas subsidiaries. Accordingly, Petitioners took the position that either the "consolidation" or "merger" seniority provisions, which called for sandwich, rather than the "buy-out" provision calling for end-tail, should have been applied.

It was part of Petitioners' argument that the motive for the complexities of the corporate transactions was a conscious desire to save costs by creating an apparent "buy-out" that would eliminate their seniority rights. The District Court, in its findings of fact, specifically determined that the evidence had failed to support this theory. (A. 234, and Appendix to this petition, App. 9a et seq.).

Yet rejection of Petitioners' theory of motive does not compel rejection of their underlying argument. The District Court most certainly made no finding of fact disputing Petitioners' evidence of a pre-planned series of transfers and acquisitions. It made instead a conclusion of law that even if such a pre-planned series existed, it was immaterial to the selection of an appropriate seniority provision.

The essential statement of the District Court reads:

> "The plaintiff has a theory that the All-American buy-out of Mid-Continent was not a simple, discreet, unique transaction, but rather the first step in a complex series of corporate maneuvers, orchestrated by Texas Gas, and that part of the scheme was to get Mid-Continent routes and effectuate savings by eliminating Mid-Continent drivers. .
>
> Plaintiffs' contention that this reveals that, at the time of the original All-American buy-out of Mid-Continent, we were really kicking off a long-range conspiracy to deprive plaintiffs of their rights is not supported by . . . any . . . evidence in the case.
>
> Whether or not this was a long-range play may or may not be true; but it isn't relevant. Whatever the subsequent steps were, the first step was a separate, unique, discreet transaction—the buy-out of Mid-Continent by All-American." (A. 230-234, App. 9a et seq.)

It is with the finding, "whether or not this was a long-range play may or may not be true; but it isn't relevant," that Petitioners disagree. This is a specific conclusion of law that the form of a corporate acquisition is more important than the substance in construing the rights of innocent third parties injured by the transaction. The law should not require such a result.

Certiorari should be allowed so that this court may establish a clear rule that, at least insofar as the rights of third parties are concerned, the ultimate plans and intentions of merging corporate conglomerates are relevant and material in construing contracts which depend for their interpretation on the status of the contracting corporation.

CONCLUSION

Wherefore, Petitioners respectfully ask that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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